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IN THE

Supreme Court of the United States

October Term 1952

No. 484

OKLAHOMA CONTRACTING COMPANY, INC., *Petitioner,*

vs.

MAGNOLIA PIPE LINE COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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WILSON - EPES PRINTING CO. - RE 6003 - WASHINGTON 1, D. C.

INDEX

PAGE

The Petition

Opinions below 1

Jurisdiction 2

Questions presented 2

Statement 2

Pleadings and proceedings below 13

Specifications of errors to be urged 18

Reasons for granting the writ of certiorari 20

1. Petitioner was denied its constitutional rights to jury trial and due process of law 20
2. There was fraud by the respondent upon the judicial process 22
3. The pipe line industry is a great one. The errors of the courts below, if allowed to stand, will have far reaching and harmful effects on both said industry and consumers 29
4. Regulation and taxation of pipe line companies may be adversely affected by the decisions below 35

Authorities

Constitution, VIIth Amendment 18, 19, 21, 36
Vth Amendment 18
Statutes, Tit. 28, Section 1254(1), U. S. Code 2
Federal Rules of Civil Procedure
Rule 38 20
Rule 57 ..... 19, 20
Rule 60(b) 19, 22

Cases:

Aetna Casualty & Ins. Co., v. Quarles, 92 Fed(2) 321 22
Arnstein v. Porter, 154 Fed (2) 464 22
Bailey v. Central Vermont R.R. Co., 319 U.S. 350 22

PAGE

Baylis v. Travelers' Ins. Co. 113 U.S. 316 21
Craig v. Smith, 100 U.S. 226 29
Dimick v. Schuedt, 293 U.S. 474 22
Enlow v. New York Life Ins. Co., 293 U.S. 379 22
Easley v. Kellom, 14 Wall. 279 29
Ettleson v. Metropolitan Ins. Co., 137 Fed. (2) 62 22
Fiske v. Buder, 125 Fed. (2) 841 23
Galloway v. United States, 319 U.S. 372 22
Hazel Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 23
Hewitt v. Hewitt, 17 Fed. (2) 716 27
Hodges v. Easton, 106 U.S. 408 22
Jacob v. New York, 315 U.S. 752 21
Kennedy v. Georgia State Bank, 8 How. 586 29
Kieley v. McGlynn, 21 Wall. 503 27
Liberty Oil Co. v. National Bank, 260 U.S. 235 21
Michaels v. Post, 21 Wall. 398 27
Nudd v. Burrows, 91 U.S. 426 27
Oliver v. Shattuck, 157 Fed. (2) 150 ..... 23, 29
Pacific Indemnity Company v. McDonald, et al. 107 Fed. (2) 446 22
Parsons v. Bedford, 3 Pet. 433 32
Piedmont Fire Ins. Co., Aaron et al., 138 Fed. (2) 732 22
Purcell v. Miner, 6 Wall. 519 29
Shields v. Thomas, 18 How. 253 21
Simon v. Southern R.R. Co., 236 U.S. 115 27
Simons, Re. 247 U.S. 231 21
Slocum v. New York, etc., 228 U.S. 364 24
Steel v. St. Louis Smelting etc., Co., 106 U.S. 447 27
Toledo Scale Co., v. Computing Scale Co., 261 U.S. 399 27
United States v. Reagan, 232 U.S. 37 22
United States v. Throckmorton, 98 U.S. 61 27

Miscellaneous

17 C.J.S. 21
Moore's Federal Practice 23
55 Yale Law Journal 23

In The

Supreme Court of the United States

October Term 1952

No. .....

Oklahoma Contracting Company, Inc., *Petitioner,*

vs.

Magnolia Pipe Line Company, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petitioner, Oklahoma Contracting Company, Inc., (hereinafter referred to as Oklahoma) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on March 22, 1952, and an order entered September 10, 1952, denying a motion for rehearing including a showing of newly discovered and material evidence.

OPINIONS BELOW

An unreported memorandum opinion of the Trial Court filed February 14, 1950, is in the record (R. 455) along with its judgment and findings of fact filed February 20, 1950. (R. 468-474). The opinion of the Circuit Court of Appeals was filed March 22, 1952. It has been reported in 195 Fed (2d) 391 and is in the record. (R. 993-1002).

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, Section 1254(1), United States Code to review the judgment entered March 22, 1952, by the United States Court of Appeals for the Fifth Circuit and its order filed Sep-

tember 10, 1952, denying the second motion for rehearing including a showing of newly discovered and material evidence. (R. 1030)

QUESTIONS PRESENTED

Questions presented by this case for the purpose of determining whether certiorari should be granted are contained herein in paragraphs numbered from 1 to 4, inclusive, under the heading: "Reasons for Granting the Writ" (Post 20). Questions presented on the merits of the case are contained herein in paragraphs numbered from 1 to 6 under the heading: "Specifications of Errors to be Urged" (Post 18).

STATEMENT

The Magnolia Pipe Line Company, (hereinafter referred to as Magnolia), an interstate carrier for hire of crude oil (R. 984-985), determined upon the construction of approximately 650 miles of pipe line (R. 502), from Corsicana, Texas, to Patoka, Illinois (R. 498). A "corrected" order dated June 27, 1946, was placed by Magnolia with the Continental Supply Company for approximately 369 miles of 20″ OD 5/16″ steel pipe, "shipping instructions to be given later" (R. 923-925) and a second "corrected" order dated July 5, 1946 was placed by Magnolia with the National Tube Company for several quantities and sizes of pipe, including 244 miles of 20″ OD 5/16″ pipe with "shipping instructions to be given later" (R. 926-928). Shipping orders were given from time to time for comparatively small quantities of the pipe (R. 926-971) and Magnolia produced no evidence that there were delays by the pipe supplier as to any of these shipping orders.

Magnolia divided the 650 miles between Corsicana and Patoka into six separate sections of varying lengths for the purpose of letting the contracts for the installation of the pipe line (R. 511). These six contracts were each

primarily labor contracts, since Magnolia was to furnish the steel pipe and all other materials except welding rods. Oklahoma placed on the job construction equipment costing over one million dollars (R. 451). Separate contracts for river crossings were also let but they are not in issue here.

Oklahoma was awarded four of the construction contracts for Sections 1, 4, 5 and 6.* While they bear separate dates in April 1947, it was stipulated on the record that all four were executed April 30, 1947 (R. 256). The four contracts to Oklahoma included the entire pipe line, from Corsicana, Texas, to Patoka, Illinois, exclusive of the river crossings, and except Sections 2 and 3 aggregating 219.08 miles from the junction near Winfield, Texas, to the junction near Conway, Arkansas. Sections 2 and 3 were let to Eastern Construction Company and H. C. Price Company, respectively. Section 1 let to Oklahoma extended from Corsicana to near Winnfield, Texas. Sections 4, 5 and 6, were numbered from the Patoka end of the pipeline and extended

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* The circumstances of the letting of these four contracts to Oklahoma were as follows:

Oklahoma submitted its sealed bids on each of the six sections on April 23, 1947 (R. 973). After the bids were submitted, Magnolia invited Oklahoma into private negotiations, and proposed to Oklahoma that if Oklahoma would reduce its bids 20 cents per lineal foot on Section 5, and 25 cents per lineal foot on Section 6, Magnolia would award Oklahoma contracts for the construction of Sections 1, 4, 5 and 6 (R. 798; 804). Oklahoma had three "spreads" of machinery, equipment and personnel (R. 385), hereinafter referred to as "gangs". Oklahoma informed Magnolia that, to avoid any great degree of winter weather construction, if Oklahoma's Section 1 gang could move immediately to Section 6, upon the completion of Section 1, and its Section 4 gang could move immediately to Section 5, upon the completion of Section 4, Oklahoma would reduce its bids 20 cents per foot on Section 5, and 25 cents per foot on Section 6. (A reduction of more than $250,000.00) Magnolia assured Oklahoma that the pipe deliveries would be materially increased on Sections 5 and 6 "to where that would be possible". (R. 356-359; 381-382). Oklahoma's third gang was to be in reserve, and was to be used "if and when needed". (R. 385-386). Oklahoma reduced its bids accordingly.

from Patoka to the junction near Conway, Arkansas. (R. 511).

A diagram showing both the entire route and the several sections is contained in the record (R. 777).

All four of these contracts for the separate sections that Oklahoma was required to construct are in the record (R. 722, 791, 796, 802 and 807). However, only the specifications for Section 1 are in the record. (R. 727-779). The specifications attached to the contracts for Sections 4, 5 and 6 have been omitted from the record. The specifications for the several sections were identical and prepared in their entirety by Magnolia (R. 971-972).

Each of these four contracts defines the Magnolia Pipe Line Company as the "Company" and the Oklahoma Contracting Company, Inc., as the "Contractor". (R. 722, 791, 802, 807). Each of the contracts similarly contains an Article 4 as follows:

> "4. It is further understood and agreed that Contractor shall have *no claim of any character whatsoever for damages for delay or work stoppage due to failure of pipe supplier to deliver pipe to Company according to the present schedule of delivery or if Company is unable to furnish the materials as needed for any other reason beyond its control.*" (R. 725, 794, 799, 805). (Italics supplied)

The specifications, under the heading, "Materials Company Shall Furnish", provided that:

> "The Company will furnish all pipe, casing, primer, doping materials, wrappers, gate valves, fittings, vent pipe and other materials to be used in the construction of said pipe line, excepting welding rods.
>
> "*Company will deliver all such pipe and other materials, which are to become a part of said line* f.o.b. cars at Railroad Stations, Pump Stations, or Railroad sidings advantageously located near the right of way. Company will accept for its consideration Contractor's recommendation as to shipping points for the delivery of all materials. Contractor will at the time his bid is submitted, file his suggestions

as to the shipping points and the amounts to each respective point.

"As soon as Company receives shipping notices on materials, Company will in turn notify Contractor. (R. 749-750).

• • • •

"Present schedule of delivery of pipe as furnished by pipe supplier is as set out below and the deliveries applicable to each section is as indicated:" (Italics supplied)

Here follows a tabulation in the record (R. 750-751) which is also quoted in the opinion of the Court of Appeals below. (R. 995-996)

The contract specifications further provided under the heading of "Time for Starting and Completing Work" that:

"It is agreed that the starting date for either of Sections 1 to 6 inclusive shall be five days after the date on which the Company notifies the Contractor that sufficient pipe will be delivered f.o.b. Railroad Station nearest to the point where work is to begin to complete five miles of line, and starting date for section 7 shall be five days from the date when Company shall notify contractor that sufficient pipe will be on hand for the completion of any one of four river crossings. The completion date as referred to in this paragraph, that is, the date on which the contractor actually completes the line, shall be the date on which all work has been completed to the satisfaction of the Company Inspector and the line can be placed in service without damage thereto, and Contractor agrees to complete said work with due diligence and within 150 calendar days for Section 1; 150 calendar days for Section 2; 150 calendar days for Section 3; 100 calendar days for Section 4; 150 calendar days for Section 5; 150 calendar days for Section 6; 90 calendar days for Mississippi River; 60 calendar days for White River; 60 calendar days for Arkansas River; and 60 calendar days for Red River

from said starting date for each of sections 1 to 7 inclusive." (R. 775).

The next succeeding paragraph of the specifications provided that in event of the failure of the contractor to furnish ample facilities and labor to complete the line within the time set forth in the specifications Magnolia should have the right to secure such necessary facilities and labor to insure completion by the contract completion date and charge any excess costs to the contractor. (R. 776). Thus contemplating that for any delays of the contractor actual damages, measured by the excess costs of construction, would be charged to the contractor.

The third and concluding paragraph in the specifications under this heading: "Time for Starting and Completing Work", is as follows:

> "It is understood, however, that in view of the uncertainty of the delivery of the pipe and materials going into this work, *in the event the Company is unable to furnish materials as needed for any reason beyond the control of Company,* then such time shall be *deducted* from such period and Company shall not be liable for damages for any such delay. The schedule for the delivery of the pipe by suppliers submitted for bids is as indicated in Section IV of these specifications entitled "Materials Company shall Furnish. (R. 776) (Italics supplied).

Oklahoma commenced construction of Section 1 of the pipe line on June 2, 1947, and duly completed the same on or about August 15, 1947 (R. 360). Oklahoma had moved a second crew and equipment to Section 4 on or about July 29, 1947. Insufficient pipe, approximately 16 miles, had been furnished by Magnolia for the completion of Section 4, consisting of approximately 73.54 miles from Patoka to the Mississippi River crossing and none had been furnished by Magnolia for Sections 5 and 6.

There previously had been approximately 100 miles of pipe delivered at railheads on Sections 2 and 3 of the pipe line and Oklahoma requested in August and September 1947, that a part of said pipe be removed to Sections 4, 5 and 6 so it could finish Section 4 and commence construction operations on Sections 5 and 6 of the line. Magnolia refused to do so.

Oklahoma had to shut down work on Section 4 on September 23, 1947, for lack of pipe, although all pipe for this section should have been completely furnished by that time. (R. 751). No pipe had been furnished by Magnolia for use on Sections 5 in September and for use on Section 6 in October 1947 (R. 751). The failure of Magnolia in this respect to furnish Oklahoma pipe as needed was not due to any failure of the pipe suppliers to deliver pipe to Magnolia in accordance with the schedule. On the contrary, as hereinafter shown (Post 8, 24-26), Magnolia received delivery of 40 miles of pipe from its supplier in August 1947, and diverted the entire quantity in August and September 1947, to the Humble Pipe Line Company instead of furnishing same to in part supply the needs of Oklahoma on Sections 4, 5 and 6, extending from Conway, Arkansas, to Patoka, Illinois. Also, Magnolia had "bunched", or overdelivered by July 27, 1947 (R. 875-878) to Section 2 and by July 22, 1947 (R. 879-886) on Section 3 of the pipe line approximately 100 miles of pipe in excess of the needs of the two contractors on said sections (Post, 11, footnote 2).

Conflicting positions of Magnolia and Oklahoma were set forth in the opinion of the Court of Appeals below as follows:

> "Oklahoma contends that this shutdown projected the time of work on Section 5 and 6 into the period of winter weather with consequent construction difficulties at increased costs which damaged it in the amount sued for. In the present litigation the main point at issue between the parties is the proper con-

> struction of the contracts referred to. The question really arises from the contention of Oklahoma that, at the time it was forced to cease operations there was approximately 100 miles of pipe located at the railheads near and on Sections 2 and 3 which were not then necessary for those operations, that Magnolia should have granted its request that the pipe be moved to Section 4 so it could proceed there and that pipe thus delivered could have been replaced with pipe later obtainable under order for Section 4. Magnolia contends that in accordance with the specifications and contract the pipe had been delivered to the contractors on Sections 2 and 3 in accordance with schedule and thus could not be removed, since it was not known when it could be replaced and if it were removed Magnolia would be liable to contractors on those Sections for any damages caused by delay. Oklahoma vigorously asserts that the contract recognizes a clear difference between the pipe delivery schedule from the 'pipe supplier to Magnolia', and the contractural obligation of Magnolia to furnish Oklahoma with pipe, as needed, after Magnolia received the pipe from the pipe supplier." (R. 947).

Subsequent to the court's opinion, newly discovered evidence showed that Magnolia had actually received from its pipe suppliers in August 1947, 40 miles of the required pipe, which Magnolia diverted during the months of August and September 1947, to the Humble Pipe Line Company to enable it to construct a different pipe line which was placed in operation in November 1947. (R. 1029-1030). Post, pages 24-26.

If such newly discovered evidence be true, Magnolia had not only failed and refused to transfer any part of the 100 miles of unused and unneeded pipe at that time on Sections 2 and 3 to Oklahoma's operations on Sections 4, 5 and 6 where such pipe was needed, but Magnolia diverted 40 miles of additional pipe to another pipe-line company when it was badly needed by Oklahoma and in violation of Magnolia's contracts with Oklahoma to furnish pipe as needed by Oklahoma.

These 40 miles of 20" O.D. steel pipe had been delivered to Magnolia by the Youngstown Sheet and Tube Company, one of the two suppliers of such pipe for use in the Magnolia Pipe-line. This evidence had been suppressed at the trial by Magnolia's representatives. Also, the record thereof was not furnished to counsel for Oklahoma among the other records of orders and shipments of pipe to Magnolia in accordance with such counsel's demand for the production of these records placed in evidence by Magnolia's counsel. (R. 351-353).

Counsel for Oklahoma promptly brought the newly discovered evidence to the attention of the Court of Appeals because the failure to produce the record showing the diversion of the 40 miles of pipe, worked a fraud on both the trial court and Oklahoma.

Magnolia did not even contest the second motion to the Court of Appeals for a new trial based in part on the newly discovered evidence or make any denial that it had diverted in August and September 1947, the 40 miles of pipe delivered by its suppliers in August 1947.

On the contrary, it was claimed by Vice President and General Manager True of Magnolia that a principal reason for the refusal of Magnolia to cause some of the pipe delivered for Sections 2 and 3 to be transferred for installation on Sections 4, 5 and 6 was the desire of Magnolia to complete the line from Corsicana to Conway so that Magnolia could commence the movement of crude oil from Corsicana to Conway in the pipe-line to be there transhipped via tank cars to points East (R. 682-684, 689-692). Mr. True thus testified:

> "Bill, this is on the record—had Magnolia Pipe Line Company transferred 16 miles of pipe from either Sections 2 or 3 or from both, at the time Oklahoma Contracting Company requested it, I would have been taking a big gamble on receiving pipe from the mill. The mills were having labor troubles, and we were scared that they would be shut down at

any time. Had I transferred that pipe and the strike had gone on, which we didn't know whether they would go on or be settled, *we would have had a gap in our line between Corsicana and Conway, Arkansas, and it would not have been completed in time to start shipping oil east as early as we did.*". R. 683).

General Manager and Vice President True further testified that:

"Another reason, that we wanted to complete in 1947 and put into operation as much of this line as we could, in order to get in our evaluation; in other words, if we could complete, in 1947, as much of this line as we could, we could render that in 1947 as in operation, and we would be allowed on that valuation to earn seven per cent". (R. 227).

Upon direct examination by Magnolia's Counsel, Mr. True further testified that Magnolia was under the United States Antitrust Consent Decree [1] and that:

"Q. Without going into the uncertainties of that decree, or the exact wording, one phase of that judgment is the seven per cent limitation on the amount you may pay your stockholders?

"A. That is true.

"Q. The excess of that is in some frozen account?

"A. That is right.

"Q. And that valuation for the Consent Decree purposes, ordinarily applies to lines in operation, is that right?

"A. That is right.

"Q. Was your objectives in putting 1, 2 and 3 into Conway, to get as much of that line in operation on the 31st of December, 1947, as possible?

"A. Yes, sir, that was." (R. 229) Compare his testimony at R.691-692.

The pipe line from Corsicana to Conway was completed about December 24, 1947 (R. 300). By December 31, 1947, Magnolia had run 4,266.62 barrels of crude oil through

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[1] Pertinent provisions of this consent decree entered December 23, 1941, are in the record (R. 21-24).

the line which was shipped out of Conway by tank cars, the only way it then could be shipped (R. 979). On the basis of having the line in use from Corsicana to Conway, even though a mere driblet of crude oil went through the line to December 31, 1947, Magnolia was enabled under the consent decree to pay a dividend to its stockholders equal to 7 percentum of the cost of the pipe line from Corsicana to Conway (R. 302). Transhipment of crude oil at Conway via tank cars was abandoned in June 1948 (R. 305). But by the small use of the line from Corsicana to Conway in 1947 Magnolia stockholders could have received in increased dividends some One Million Dollars (R. 386-387), even though Oklahoma has alleged it incurred a loss in excess of one million dollars through the failure of Magnolia to furnish pipe as needed by Oklahoma on Sections 4, 5 and 6 of the pipe line (R. 196), and because Magnolia furnished approximately 100 miles of pipe in excess of current needs of the contractors on Sections 2 and 3, which excess Magnolia denied to Oklahoma currently needing the same on Sections 4, 5 and 6.

Not only was Magnolia reserving the 100 miles of pipe not then needed in August and September 1947 by the contractors on Sections 2 and 3 of the line, and considerable parts of which were not used until many weeks thereafter (R. 877-878, sec. 2 of 883-886, Sec. 3), so as to drive the line through to Conway regardless in order to take advantage of the Consent Decree and increase the dividends payable to stockholders by placing that segment of the line in operation before December 31, 1947,[2] but wholly unknown to Oklahoma, until after this suit had

[2] In fact, as late as November 25, 1947, the contractor for Section 3 of the line, extending from Muphreesboro, Arkansas, to Conway, Arkansas (R. 511) had not completed the line (R. 844-845) and Magnolia induced Oklahoma to commence construction of this line at the southern end and move northward to a junction with the other contractor (R. 847-851) in order to get this segment of the pipe line in operation and qualify for the increased dividends by December 31, 1947.

been tried in the District Court and had been decided on appeal in the Court of Appeals, Magnolia had diverted to the Humble Pipe Line Company in August and September 1947, some 40 miles of the identical pipe delivered to Magnolia by the Youngstown Sheet and Tube Company (R. 24-25).

During the shutdown, from September 23rd to October 16, 1947, (22 days), the weather and construction conditions were excellent (R. 410-412). Pipe arrived the night of October 15, 1947 (R. 410). The weather continued good for about nine days, and on or about October 25, 1947, rain and bad weather came, and continued to the end of the job (R. 288-299; 412). Section 4 was completed on or about November 20, 1947, (R. 408-412). The difference between the actual cost of per lineal foot construction for the last 16 miles, and what it would have cost, if Magnolia had furnished pipe as needed, was $147,546.00 (R. 426-427; 988). The evidence of these damages is uncontroverted in the record.

The delay resulting to Oklahoma on Section 4 forced a delay in starting construction of Section 5, in Missouri, with the Section 4 gang. After the completion of Section 4, on or about November 20, 1947, the Section 4 gang moved across the Mississippi, on or about November 21, 1947, and commenced construction of Section 5 (R. 412). Bad weather and construction conditions continued throughout the construction of this section, which was not completed until on or about May 18, 1948 (R. 412). The difference between the actual cost of construction of this section and what it would have cost had Magnolia furnished available pipe as needed was $659,528.00 (R. 428; 988). The evidence of these damages is uncontroverted in the record.

Pipe arrived and the Section 1 gang moved to Section 6, in Arkansas, on or about November 23, 1947, to start construction of that section, when Magnolia prevailed upon Oklahoma to move this gang to Section 3 in Arkansas to help the Price Company complete that section (R. 138). The Section 1 gang was on Section 3 from November 27, 1947, until December 13, 1947 (R. 422). Construction of Section 6 began on or about December 18, 1947 (R. 422). Bad and winter weather prevailed (R. 402). This section was not completed until May 16, 1948 (R. 401-402). The difference between actual cost of construction of this section, and what it would have cost had Magnolia furnished pipe as needed, on or about September 1, 1947, was $705,975.00 (R. 428; 988). The evidence of these damages is uncontroverted in the record.

THE PLEADINGS AND PROCEEDINGS BELOW

A summarization of the pleadings and proceedings below may add to clarification of Petitioner's application to this Court.

After abortive attempts to reach a final amicable settlement of its damage claims, following the full and complete performance of its contracts for the construction of Sections 4, 5, and 6 (R. 146-151), Oklahoma instituted proceedings to perpetuate the testimony of L. H. True and George T. Jackson, officials of Magnolia, in the State District Court of Dallas County, Texas, on or about September 1, 1949 (R. 69-72; 130). Magnolia's legal department sought to enjoin these proceedings, but on September 14, 1949, after a hearing thereon, injunctive relief was denied, and the Court ordered the parties to proceed with the taking of the depositions (R. 130-131), which was set for September 27, 1949 (R. 131).

On September 19, 1949, Magnolia filed a paper in the United States District Court for the Northern District of

Texas, at Dallas, entitled "Complaint" purporting to allege a declaratory judgment action and containing therein a spurious claim for the recovery of money paid by Magnolia to Oklahoma under contract (R. 50-62).

At this point, it is to be noted that Magnolia Pipe Line Company is a Texas corporation with its principal office and place of business in Dallas, Dallas County, Texas. Oklahoma Contracting Company, Inc. is a Delaware corporation, with a permit to do business in the State of Texas, and having its principal office and place of business in Dallas, Dallas County, Texas (R. 50-51).

This Court is respectfully requested to examine Magnolia's "Complaint", particularly the jurisdiction allegations and the "declaratory-judgment" prayer (R. 50-62).

The $36,276.00 item in the "Complaint", (R. 54-55; 61 (b)), represented accrued percentage retainage withheld by Magnolia from per-lineal-foot construction earnings of Oklahoma as provided under its contracts for the construction of Sections 4, 5 and 6, (R. 769 (C); 754 (E)). This item was not litigated, and was distributed to the parties by their stipulation prior to trial (R. 472-473). No controversy in truth and in fact ever existed on this item. This is the identical item covered and referred to in Magnolia's letters of August 13, 1948, (R. 152-153), and October 29, 1948, (R. 154-155) in the amount of $37,894.71. Between those letters and the filing of Magnolia's "Complaint", some additional off-right-of-way damage claims had been received. Oklahoma had returned the $37,894.71 check to Magnolia each time (twice) for the same reason, as set forth in each letter of transmittal from Oklahoma; namely, such check did not "constitute payment in full for all of our claims on account of construction of the 20" Corsicana-Patoka oil line". (R. 153-154; 155-156).

The $268,274.50 item, set forth in the "Complaint", (R. 59(n); 61 (C)), was an item paid by Magnolia to Oklahoma under the provisions of Magnolia's letter agreement addressed to Oklahoma, dated April 5, 1948, (R. 870-871), which payment was made to Oklahoma, after Oklahoma had fully performed the agreement, as an "extra", as evidenced by Magnolia's voucher and correspondence records (R. 141-142; 976-977; 978).

Oklahoma's motions to dismiss the "Complaint", (R. 63-69; 117-127), in substance, alleged that State Court actions were pending; that the proceeding was instituted by Magnolia to select its forum and to circumvent the jurisdiction of the State Courts; that the proceeding sought to have adjudicated Magnolia's defenses to common law actions for damages already vested in Oklahoma; that the damage claims of Oklahoma were not the proper subject and not within the scope of the declaratory judgment Act, as amended; that Magnolia filed its "Complaint" with full knowledge that the institution by Oklahoma of its common law damage claims was imminent. Both sets of motions to dismiss were overruled. (R. 116; 159).

Oklahoma timely filed its demand for a jury, with written notice to opposing Counsel, and the case was placed on the jury docket (R. 157-158), after which, the Trial Court, "on its own motion ordered and directed that the case would be tried as a nonjury case, to which action and ruling of the Court defendant, Oklahoma Contracting Company, Inc., then and there objected and excepted." (R. 161).

Oklahoma timely filed a controverting affidavit to Magnolia's motion for summary judgment, which motion was overruled (R. 128-156; 159-161) along with its other motions.

Oklahoma timely filed an amended answer and cross action, subject to, and without waiving its motions to dismiss (R. 162), the substance of Oklahoma's pending cross action, for actual and exemplary damages, being, that Magnolia had contracted to furnish Oklahoma all pipe and other materials to be used in the construction of Magnolia's pipe line; that Oklahoma was compelled to experience work stoppages and delays during the construction of Section 4, as a direct and proximate result of Magnolia's arbitrary and wilful failure and refusal to furnish Oklahoma with available pipe on hand, required to construct its pipe line; that this work stoppage and delay forced Oklahoma into bad and expensive construction conditions; that the wilful and arbitrary failure and refusal of Magnolia to furnish Oklahoma with available pipe on hand delayed Oklahoma in starting its construction of Sections 5 and 6, thereby forcing Oklahoma into costly bad and winter weather construction conditions; that Magnolia arbitrarily and wilfully discriminated against Oklahoma in favor of Sections 2 and 3, so that Magnolia could reap big profits under the Consent Decree by completing Sections 2 and 3 in 1947; that all pipe and other materials, to be used in the construction of said line, were exclusively owned, and controlled by Magnolia at all times; that the acts and deeds of Magnolia were calculated, wilful, deliberate, arbitrary and wrongful, and in total and unconscionable disregard of Magnolia's contractual obligations to Oklahoma (R. 162-198).

The case went to trial February 13, 1950, before Judge Atwell, without a jury (R. 206). The Court gave an oral opinion February 14, 1950, in which he found against Magnolia on its claims, and concluded that Oklahoma was entitled to recover $11,314.18 for watering down pipe, as an "extra", but denied Oklahoma all other relief sought (R. 455-456). The Court filed its written findings of fact and conclusions of law on February 20, 1950 (R. 468-474).

Oklahoma seasonably filed its notice of appeal March 21, 1950 (R. 474-476), its bond (R. 477), and its statement of points on appeal, April 18, 1950 (R. 479-482).

Magnolia did not appeal, and promptly paid off the money judgment against it in the amount of $11,314.18. (R. 547-549).

Upon appeal, the Court of Appeals determined that the motion for a jury trial should not have been denied Oklahoma, in accordance with the Constitutional right given a litigant, but concluded that under the construction given the contract by the Court, a jury trial would have been futile (R. 1001-1002), even though "the importance of this right discloses the danger of any retrospective weighing of injury resulting from the improper denial of trial by jury".

The Court of Appeals found and held that "there would have been substantial merit in Oklahoma's claim that the matter was not one which the (Trial) Court should have entertained" (R. 1000-1001), however "the Court had jurisdiction of the claim for the recovery of the $268,000.00" item, even though the record is that no real justiciable issue was before the Court on this item. (R. 870-871; 976-977; 978; 141-142; 249-251).

The Court of Appeals found and held that under the terms of the contract, and "the undisputed facts", Magnolia was "not liable to Oklahoma for its damages sustained as a result of the delay in procuring pipe necessary to the construction of Section 4" • • • "due to failure of pipe supplier to deliver pipe to Magnolia", and "failure of delivery to it (Magnolia) by the suppliers as thus allotted to each section and that since it is undisputed that as to the sections involved in Oklahoma's contracts (Sections 4, 5 and 6) the pipe was not so supplied the delay is clearly within the terms of the contract excusing it from any liability for damages." This decision

of the Court of Appeals disregards and ignores two vital contract provisions:

> "*IV.* Materials Company Shall Furnish.
> "The Company shall furnish all pipe * * * and other materials to be used in the construction of said pipe line, excepting welding rods.
> "Company will deliver all such pipe and other materials, *which are to become a part of said line* * * *."

Likewise, the Court of Appeals has completely disregarded and ignored the newly discovered evidence relating to approximately 40 miles of identical pipe that was diverted and transferred by Magnolia to Humble Pipe Line Company, which pipe had been consigned and delivered to Magnolia by Youngstown Sheet and Tube Company, one of Magnolia's two pipe suppliers, in August and September or August or September, 1947, the identical period Oklahoma was compelled to shut down on Section 4, and was forced to delay the start of construction on Sections 5 and 6. (R. 1025-1030)

SPECIFICATIONS OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In refusing to protect Oklahoma in its written demand, seasonably made to the trial court, in a suit at law for a jury trial as guaranteed in the VIIth Amendment to the Constitution of the United States and as provided in both the applicable Statutes of the United States and by Rule 38(a) and (b) of the Federal Rules of Civil Procedure prescribed by this Court for the District Courts of the United States, thereby depriving Oklahoma of due process of law as guaranteed in the Vth Amendment.

2. In refusing to hold that the complaint for a Declaratory Judgment sought to invoke an inappropriate procedure for the determination of the complex issues between Magnolia and Oklahoma and in refusing to hold that even

if such Declaratory Procedure be appropriate, the defendant Oklahoma was entitled to due process of law under the Vth Amendment and to a jury trial as demanded and as provided in the VIIth Amendment to the Constitution of the United States and as provided in Rule 57 of the Federal Rules of Civil Procedure.

3. In refusing to reverse the trial court and direct a new trial on the basis of the newly discovered and material evidence—presented by motion to the Court of Appeals under Rule 60(b) of the Federal Rules of Civil Procedure, on behalf of Oklahoma, and which evidence had been suppressed by Magnolia showing that it had transferred and diverted 40 miles of 20-inch pipe, identical with that being installed in the Magnolia pipeline, to another pipe line company at the identical time that Oklahoma was badly in need of additional pipe to continue pipeline construction for Magnolia. Thereby a fraud was worked by Magnolia, whether intentional or not, on both the trial court and Oklahoma.

4. In so construing and interpreting the contract between Magnolia and Oklahoma that the said Magnolia was permitted to contract against its own negligence, design and inaction in not furnishing enough pipe to enable Oklahoma to have pipe when needed for its construction operations for Magnolia and thereby enabling Magnolia to place the interests of its stockholders in increased dividends superior to the contract obligations of Magnolia to Oklahoma.

5. In refusing to hold that under the terms of the contracts between Magnolia and Oklahoma the former was responsible in damages to the latter when Oklahoma needed pipe and other materials with which to continue construction operations and Magnolia had received delivery of same from the pipe supplier but refused to furnish same to Oklahoma because Magnolia had unilaterally concluded to finish three consecutive sections of the pipe line so

that it could use the same and obtain the benefit of such use for purposes of increased dividends to its stockholders and because Magnolia elected to divert 40 miles of the pipe to another and separate pipe line company for its use.

6. In refusing to impose on Magnolia, an interstate carrier for hire, subject to regulation by the Interstate Commerce Commission, legal liability based on jury determined facts and the terms of Magnolia's contracts with Oklahoma for construction of its pipe lines, the costs of which, and the depreciation for which enter into the base of Magnolia for payment of dividends under the Consent Decree and in its rate base as well as in its depreciation base for the payment of corporate income taxes.

7. In affirming the judgment of the trial court.

REASONS FOR GRANTING THE WRIT

1. *Oklahoma was denied its constitutional right to a jury trial and due process of law.*

Unquestionably the amounts involved exceeded $20.00; unquestionably a written demand was seasonably made for a jury trial; unquestionably the VIIth Amendment to the Constitution of the United States guarantees to Oklahoma an unqualified right to a jury trial; and unquestionably whether this complaint filed by Magnolia be considered a common law proceeding or a Declaratory Judgment proceeding both Rule 38(a) and (b) and Rule 57 of the Federal Rules of Civil Procedure require that in either event a jury trial be accorded to a plaintiff or defendant when demanded and there are issues of fact involved in a law or Declaratory Judgment proceeding.

It is unquestionably true that constitutional government either does not exist in the present day world or it is under attack to a more or less extent where it does exist. Among the dearest of constitutional rights of Americans

is the right of a trial by jury which the founders were unwilling to leave to the Constitution as written in Philadelphia but insisted upon a specific guarantee of that right as contained in the VIIth Amendment. It ill behooves any court in the Federal system to deny the right to a trial by jury in a suit at law or in a Declaratory Judgment proceeding where there are disputed facts involved and the amount in issue is in excess of $20.00, yet that was done by the trial court in this case and while the Court of Appeals admitted the error, it refused to reverse the case because of the interpretation it had placed on the contracts. Courts were never under greater responsibility to enforce constitutional rights than they are under today.

That there were and are disputed issues of fact between Magnolia and Oklahoma is plainly apparent from the allegations contained in the complaint, in the amended answer and cross-complaint, and in the reply.[3]

The pipe line industry is a vast one, both in extent and costs. Its construction problems differ widely from those common to other industries. No court of appeals and no trial court should be permitted, in determining the rights and liabilities under pipe line contracts to disregard both the VIIth Amendment and the Rules of Civil Procedure for the District Courts.

Liberty Oil Co. v. *National Bank,* 260 U.S. 235
Shields v. *Thomas,* 18 How. 253
Re *Simons,* 247 U.S. 231
Baylis v. *Travelers' Insurance Co.,* 113 U.S. 316.
Jacob v. *New York,* 315 U.S. 752.

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[3] "How damages for a breach of contract are to be measured is a matter of law; but whether any damages were, and the amount thereof, are usually questions of fact. Other questions of fact include the right to extra compensation, or the amount thereof, the amount of a balance due on a contract, whether particular circumstances increased the cost of performing the contract, and to what extent, whether deductions or offsets should be allowed or in what amount, and whether one is entitled to recover on a counterclaim." 17 C.J.S. Par. 631).

Parsons v. *Bedford*, 3 Pet. 433
Slocum v. *New York, etc.*, 228 U.S. 364
Bailey v. *Central Vermont R. Co.*, 319 U.S. 350.
Dimick v. *Schuedt*, 293 U.S. 474
Hodges v. *Easton*, 106 U.S. 408
United States v. *Regan*, 232 U.S. 37.
Galloway v. *United States*, 319 U.S. 372.
Enelow v. *New York Life Ins. Co.*, 293 U.S. 379.
Aetna Casualty and Surety Company v. *Quarles*, et al., 92 Fed. (2nd) 321.
Piedmont Fire Ins. Co. v. *Aaron, et al.*, 138 Fed. (2nd) 732
Ettleson v. *Metropolitan Life Ins Co.*, 137 Fed. (2nd) 62.
Pacific Indemnity Co., v. *McDonald, et al.* 107 Fed. (2nd) 446.
Arnstein v. *Porter*, 154 Fed (2nd) 464.

That is to say *the refusal of the trial court to grant a jury trial upon written demand of the defendant therefor and the refusal of the Court of Appeals to reverse the trial court by reason thereof are in conflict (1) with the VIIth Amendment, (2) the Rules of Civil Procedure issued by this Court and mandatorily binding upon all inferior Federal courts, (3) the rules established by the cases in this Court in its opinions and judgments concerning jury trials, and (4) applicable cases in other Courts of Appeals.*

2. *There was fraud upon the judicial process,* whether intentional or otherwise counsel do not undertake to state. Such fraud was brought to attention of the Court of Appeals under Rule 60(b) of the Federal Rules of Civil Procedure and that court should have reversed the trial court and remanded the case for the determination of the issue and for the allowance of a jury trial in a retrial of the case.

The integrity of the judicial process is one of the principal keystones in the arch of constitutional government. The courts generally have been both astute and vigilant to ferret out and correct any fraud or gross irregularity in the judicial process, particularly if such fraud or irregularity could, or did influence the judgment of the court

or the verdict of the jury. Counsel for Oklahoma are fully aware of the gravity of their charge but nothing less seems justified on the basis of the newly discovered material evidence first discovered after the judgment of the trial court and after the affirming opinion of the Court of Appeals which was promptly brought to the attention of that Court as a part of a motion for rehearing (R. 1025-1030) as provided in Rule 60(b) of the Federal Rules of Civil Procedure.

Oliver v. *Shattuck*, 157 Fed (2nd) 150.
Fiske v. *Buder*, 125 Fed. (2nd) 841.
Hazel-Atlas Glass Co. v. *Hartford Empire Co.*, 322 U.S. 238.
3 Moore's Federal Practice, 1938, 3267 et seq.
Moore & Rodgers, Federal Relief from Civil Judgments, 55 Yale L.J. 623, 653-659.

During the course of the proceedings in the trial court, counsel for Oklahoma made demand that Magnolia furnish the record showing the orders for purchase of the pipe, the orders for shipment, the dates of shipment of such orders, and the quantities thereof for the construction of the pipe line from Corsicana to Patoka. Representatives of Magnolia purported to comply with the demand and represented that the papers delivered were all of the records of the purchases, orders for shipping, and shipments of the pipe (R. 351-353). Magnolia's counsel made the records so furnished a part of the trial record (R. 873-948), though many of such records are contained in the printed record here in summary form, only.

After trial and the judgment at the conclusion thereof dismissing the claims of Magnolia for a money judgment and entering judgment in favor of Oklahoma for some $11,000.00-odd for watering a part of the pipe line, and after the appeal by Oklahoma to the Court of Appeals and its judgment had been rendered, affirming the judgment of the trial court, Oklahoma, by mere chance, discovered that during the months of August and September 1947, when it badly needed pipe to continue construction and could not secure the same from Magnolia, that Com-

pany, Magnolia, had diverted and transferred to the Humble Pipe Line Company, another separate and sister pipe line company in the Standard Oil family, at least 40 miles of the identical pipe which Magnolia was using for the construction of the Corsicana-Patoka line.

An affidavit executed June 27, 1952 by Mr. W. P. Hughes was obtained by Oklahoma and filed by counsel in the Court of Appeals on July 24, 1952, as follows:

"State of Texas)
County of Harris) SS

"Before me the undersigned authority personally appeared W. P. Hughes, resident of Harris County, Texas, who after having been duly sworn deposes and says:

"My name is W. P. Hughes, a resident of Harris County, Texas. In the year 1947 I was employed by Joe D. Hughes, Inc., as pipe Stringing Superintendent. During the months of August and September 1947 I was in charge of hauling from Mayes Bros. Inc. Coating Plant in Harris County, Texas approximately 40 miles of twenty (20") inch O.D. steel line pipe—said pipe was stenciled 'Magnolia Pipe Line Company, c/o J. E. McGeath'. This pipe was shipped by Youngstown Sheet and Tube Company, Youngstown, Ohio. This pipe was strung on Humble Pipe Line Company's right-of-way and laid in Humble's system between their Satsuma Pump Station and Baytown Tank Farm by Latex Construction Company of Houston, Harris County, Texas and placed in operation on or about November 1, 1947.

/s/ W. P. Hughes

"Sworn to and subscribed this 27th day of June 1952.

/s/ Casper C. Winter

Notary Public, Harris County, Texas." (R. 1034).[4]

The Youngstown Sheet and Tube Company, Youngstown, Ohio, was one of the two pipe manufacturers supplying

[4] This affidavit is corroborated in a letter dated July 29, 1952, from Mayes Bros., Inc., to counsel in this case which has been sworn to by the office manager of the said Company, as follows:

pipe for installation in the Magnolia line and the shipping orders issued by Magnolia from time to time required the pipe to be shipped to "Magnolia Pipe Line Company, c/o J. E. McGeath" (R. 923-971). We repeat that no evidence was produced by Magnolia that the suppliers failed to make delivery in any instance in accordance with the shipping orders.

"H. Boyd Mayes
President & General Manager
MAYES BROTHERS INCORPORATED
Pipe Cleaning, Coating & Wrapping Contractors
1150 McCarty Street
Box 2062,
Houston, Texas
July 29, 1952

"Mr. William S. Campbell
Mercantile Bank Building
Dallas, Texas

Dear Sir:

"Complying with your request contained in your letter of July 28, 1952, this is to advise that Houston Belt and Terminal Railroad Company delivered to us approximately forty (40) miles of 20" OD 65.71 pounds per foot steel line pipe, during August 1947. Same having been consigned to Magnolia Pipe Line Company, care of Mayes Brothers, Inc., Houston, Texas, and was shipped by Youngstown Sheet and Tube Co., Youngstown, Ohio.

"This pipe was unloaded at this plant, coated and wrapped, and laid in Humble Pipe Line Company's system between Satsuma and Baytown by Latex Construction Company."

Yours very truly
MAYES BROTHERS INCORPORATED
/s/ L. T. Daugherty

.....
L. T. Daugherty, Office Manager.

Subscribed and sworn to before me this the 29th day of July 1952.

/s/ R. E. Webb,
Notary Public in and for Harris County, Texas."

This affidavit is not in the printed record here but it had been filed in, and brought to the attention of, the court below. A photostatic copy of the original document has been filed with the clerk of this Court under certification of the Clerk of the Circuit Court.

If these affidavits by Mr. Hughes and by a representative of Mayes Bros. Inc., correctly state the facts—and their truth or falsity may be established only after hearing the evidence in open court—it is unquestionable that 40 miles of pipe, which could have been used by Oklahoma in completing Section 4 of the pipeline and commencing work on Sections 5 and 6, were diverted and transferred by Magnolia during this time of need by Oklahoma to the Humble Pipe Line Company and used by that company in its pipeline.

It is equally unquestionable that if these affidavits correctly state the facts and had these facts been brought to the attention of the trial court, as a part of the evidence, the bottom would have fallen out of Magnolia's defense that it was unable to secure pipe from its suppliers when needed by Oklahoma. Even credulity leaves no room for belief that Vice President and General Manager True of Magnolia and President Latimer did not know in 1950, at the time of this trial before Judge Atwell, that in August and September 1947, 40 miles of identical 20-inch O.D. Steel Pipe was transferred, diverted or what have you by Magnolia to the Humble Pipe Line Company (Ante, pp. 9-10; Post 27-28).

The failure of Magnolia to furnish with the shipping records and pipe purchase records the documents showing this transaction and the diversion of 40 miles of 20-inch steel O.D. pipe to Humble in August and September 1947, constituted suppression of evidence, vital to defendant, Oklahoma in the prosecution of its cross-complaint and constitutes a fraud on both the courts and Oklahoma.

We have heretofore stated that Magnolia filed no defense or explanation whatever in the Court of Appeals in opposition to the allowance of the motion based on this newly discovered and material evidence.

Fraud vitally affects even the most solemn judgments and decrees. *Nudd* v. *Burrows,* 91 U.S. 426. Fraud will vitiate any adjudication when discovered and brought to the attention of the court, *Kieley* v. *McGlynn,* 21 Wall. 503. The Court will deprive any party of the benefits of a judgment obtained by fraud and if brought to the attention of the court, even after judgment, equity will restrain the enforcement of such judgment. *Simon* v. *Southern R. Co.,* 236 U.S. 115, *Hewitt* v. *Hewitt,* 17 Fed. (2nd) 716; Where fraud or deception practiced by one party prevents the other party from exhibiting fully his case to the court, the judgment or decree will be set aside, *United States* v. *Throckmorton,* 98 U.S. 61; *Toledo Scale Company* v. *Computing Scale Company,* 261 U.S. 399; *Steel* v. *St. Louis Smelting & Refining Co.,* 106 U.S. 447; *Michaels* v. *Post,* 21 Wall. 398.

There was not only failure of Magnolia to bring to the attention of the trial court that in August and September 1947, it had diverted and transferred to Humble Pipe Line Company 40 miles of 20-inch O.D. steel pipe delivered to it in August 1947 by its supplier but the sworn testimony of representatives of Magnolia in the trial court is that at this time—when Oklahoma was clamoring for pipe and Magnolia was diverting 40 miles of pipe to the Humble Pipe Line Company—such representatives did not know where such pipe could be obtained. Mr. True, vice president and general manager of Magnolia testified:

> "We tried other companies and other mills.
> "Q. Did you have any pipe in open stock piles?
> "A. We didn't have any pipe anywhere, other than pipe we had on Sections 2 and 3. We did have some 100 miles of pipe out on Sections 2 and 3. (R. 237-238).
>
> "Q. Now as of September 3, 1947, did you know at any time when or where you would get the 16 or 18 miles to fill out the pipe undelivered on Section 4?
> "A. No, sir, I didn't know when, or if ever, we would get that pipe." (R. 243).

At page 210 of the record the President of Magnolia, Mr. Latimer, testified on direct examination:

> "Q. Did you make any effort, Mr. Latimer, at about that time, to secure 20-inch pipe to fill out the balance on Section 4 and pipe for Sections 4 and 5?
> "A. We made every effort we knew how, at that time. I called Mr. McConnon, general sales manager of National Tube in Pittsburg, on two different occasions; I had numerous conversations along about that time, trying to get more pipe.
> "Q. Did you make efforts such as United Gas, and other companies, to get pipe?
> "A. We searched the industry to find pipe, yes, sir.

At page 311 of the record Mr. Latimer further testified:

> "Q. On 5 and 6, what efforts did you make to secure pipe?
> "A. We kept after the mills to get additional pipe, and talked to our parent Company, Socony-Vacuum, we apprised them of our situation. They had some pipe going to South America that they released to us. I believe that was Youngstown.
> "Q. Was that some 57 miles?
> "A. I believe that is the correct figure."

And at page 312 of the record Mr. Latimer continued:

> "Q. Isn't it a fact that insofar as Magnolia is concerned, with these pipe suppliers as to tonnage, you tried to give this 20-inch pipe priority?
> "A. We wanted to give that line priority, yes, sir."

Mr. True testified that Magnolia knew the latter part of July 1947, that National Tube "would be delayed in delivering this pipe" (R. 238), information which was not relayed by Magnolia to Oklahoma. Mr. True had this knowledge at the same time he or his Company diverted 40 miles of the pipe to the Humble Pipe Line Company—a diversion made at a time whilst Mr. True and Mr.

Latimer testified they were scouring the mills and countryside in search of necessary pipe to deliver to Oklahoma so it could continue operations!

We believe that our claim of suppression of evidence and of fraud on the trial court on the part of Magnolia is amply sustained by a comparison of such testimony by Messrs. True and Latimer with the above quoted affidavits executed by Mr. Hughes and by the office manager of Mayes Brothers, Incorporated. We also have a photostatic copy of papers showing shipments of pipe to Magnolia in care of Mayes Bros. Inc., copies of which, likewise have been deposited with the clerk of this court. Upon a new trial, the witnesses and documents will be produced to establish this diversion of the pipe and, if possible, the reasons why the evidence was withheld from the trial court and counsel for Oklahoma.

While formerly relief could be had in such a case by a bill of review, it may now be obtained under the specific terms of Rule 60(b) of the Rules of Civil Procedure for the District Courts.

Oliver v. *Shattuck*, 157 Fed. (2nd) 150.
Kennedy v. *Georgia State Bank*, 8 How. 586.
Purcell v. *Miner*, 4 Wall. 519.
Easley v. *Kellom*, 14 Wall. 279.
Craig v. *Smith*, 100 U.S. 226.

3. The pipeline industry is a great and growing industry, with investments of many millions and effecting millions of users of fuel oil and gasoline and effecting both consumers and producers of competitive fuels. *The construction placed by the courts below on the contracts here involved, practically identical in terms, will have far-reaching influence. That construction of the said contracts is so grossly in error that it should not be permitted to stand.*

The claimed motivation of Magnolia for its actions under the contracts in refusing to furnish 20-inch steel

pipe to Oklahoma with which it could continue, and even complete its sections of the 650 mile pipe line before winter weather rendered construction operations impossible or most expensive were three: (1) That in July, August and September 1947, or even later the pipe line manufacturers were shut down by strikes, or labor troubles; (2) That the 100 miles of pipe on Sections 2 and 3 not needed by the respective contractors for quite some time could not be removed without rendering Magnolia liable to such contractors in damages if the pipe could not be replaced when needed by them;[5] and (3) That Magnolia wanted to first complete Sections 1, 2 and 3 to Conway, Arkansas, before December 31, 1947, so that said Company could pay additional dividends to a maximum of 7% under the Consent Decree on the several millions of dollars invested by Magnolia in the pipeline in use on December 31, 1947, from Corsicana to Conway.

Oklahoma insists that the real and controlling reasons why Magnolia did not deliver the pipe so that Oklahoma could continue construction operations in August, September and succeeding months, until winter weather arrived or the line was completed, are: (1) Magnolia, as it now appears, diverted 40 miles of the pipe in August and September, 1947, to the Humble Pipeline Company, thereby using the pipe for a different purpose than furnishing it at appropriate railheads for use on Sections 4, 5 and 6 of the pipe line and then suppressed evidence thereof from both the trial court and Oklahoma, and (2) That when Magnolia realized in the summer of 1947, after it had diverted the 40 miles of pipe to Humble Pipeline Company, that enough additional pipe probably could not be obtained to fully complete the pipeline from Corsicana to Patoka, Magnolia decided to concentrate on completing the line to Conway and place the Corsicana-Conway segment in operation before December 31, 1947, in

[5] Any such argument by Magnolia is, in effect, an admission of liability to Oklahoma for failure to furnish pipe as needed and the supplier of pipe had delivered same to Magnolia.

order to obtain for its stockholders the increased dividend under the Consent Decree, reported to have been approximately $1,000,000. (R. 386-387). In order to be sure of the latter accomplishment, Magnolia determined to retain the 100 miles of pipe on Sections 2 and 3 and even to employ a third construction contractor, Oklahoma, to assist one of the other two contractors in completing Section 3 of the line to Conway. The record shows the slow progress of the contractor on Section 3 of the line (R. 880-886).

Magnolia admitted that at least one of its primary motives was to get the line from Corsicana to Conway in operation before December 31, 1947, in order to pay the additional dividends to its stockholders (R. 683).

Magnolia's claim that it could not obtain the pipe in 1947 for the line because of labor troubles in the pipe manufacturing plants is completely spurious and is so proven by the newly discovered evidence that during this alleged labor trouble period Magnolia received delivery from a pipe manufacturer of, and diverted 40 miles of pipe to the Humble Pipeline Company. Later the factories did deliver the pipe for Sections 5 and 6 but before all of it could be installed, after it was delivered by the pipe suppliers and furnished by Magnolia, the wet weather appeared, to which reference has been previously made (Ante, pp. 12-13).

In other words, the pipe manufacturers could and did deliver 40 miles of pipe to Magnolia at the very time, or close thereto, when Messrs. True and Latimer testified that their company could not locate any pipe. Also, the desire of Magnolia to pay greater dividends to its stockholders, by placing a segment of the pipe line to Conway in operation by the end of 1947, was equally no excuse for failure to use some of the 100 miles of pipe on Sections 2 and 3 to enable Oklahoma to continue on Sections 4, 5 and 6.

Under the holdings of the courts below the contracts and their specifications absolved Magnolia from all damages as for breach of the contracts in failing to furnish pipe sufficient to enable its contractors to continue to the completion of their various segments of the pipeline within the periods of time respectively fixed in the contract papers therefor after orders to proceed. (Ante 5). We assert without fear of successful contradiction that the construction placed on this contract by the Circuit Court is grossly erroneous but even if it could be held otherwise, Magnolia may not escape liability for the excess costs of Oklahoma upon the showing that Magnolia had diverted 40 miles of pipe to the Humble Pipe Line Company at a time in August and September 1947 when Magnolia knew only too well that Oklahoma was nearing exhaustion of the pipe on Section 4 and was asking for additional pipe to complete said section and to commence work on Sections 5 and 6 of the pipeline.

The applicable terms of Article 4 of the respective contracts and of the specifications have been quoted in the "Statement" herein. (Ante, p. 4-6). We submit that under the terms of such contracts, properly construed, Magnolia may not escape damages for the delay and neglect in the delivery of pipe unless same was due "to failure of pipe supplier to deliver pipe according to present schedule of delivery or if the company is unable to furnish the materials so needed for any other reasons beyond its control."

The pipe supplier did not fail in delivery of 40 miles of pipe, a very large quantity, to Magnolia. The pipe suppliers delivered the same at the time Oklahoma needed it, but, unknown to Oklahoma, Magnolia diverted the pipe to the Humble Pipe Line Company. Certainly the failure of Magnolia to furnish these 40 miles of pipe to Oklahoma was not due to failure of the pipe supplier to deliver pipe to Magnolia nor was the diversion a cause of delay to Oklahoma beyond the control of Magnolia.

As to the refusal of Magnolia to prorate the 100 miles of pipe it had at the railheads elsewhere for Sections 2 and 3 of the pipeline among the several unfinished sections in accordance with the then present needs of the respective contractors, instead of bunching or piling the same up on Sections 2 and 3 where it could not be, and was not used for literally months (R. 386-388), the resulting failure of Oklahoma to receive the pipe from Magnolia as "needed" was certainly not a failure of the pipe supplier to deliver pipe to Magnolia nor was it a delay beyond the control of Magnolia. If the contrary were true, Magnolia could have bunched or piled the entire supply of pipe it received from time to time from its pipe suppliers on the banks of the Mississippi, refused to distribute any pipe to the contractors, and could have claimed in defense of claims for their damages because of such refusal that if the pipe were removed, Oklahoma might have a claim against the Company for damages in event the pipe was not replaced and, too, Magnolia wanted to get the pipe installed to Patoka in order to ship crude oil from barges on the Mississippi River through that segment of the line to Patoka to connect there with another pipeline or tank cars to the east.

The good faith of Magnolia as to its fear of being unable to replace the pipe on Sections 2 and 3 if part of the 100 miles of pipe was furnished to Magnolia is impunged by the admission of Magnolia's officers that one of the primary reasons it had for wanting to complete the line from Corsicana to Conway by December 31, 1947, and get the same in operation was the desire of Magnolia to be able to pay its stockholders increased dividends based on 1947 use of the Corsicana-Conway segment of the pipeline. Also, such good faith is impunged by the knowledge of Magnolia's officials that said company had received delivery of 40 miles of the pipe during the alleged labor trouble period which said company had diverted to other uses.

The rights, and even the solvency of Oklahoma were not left by the contracts to the whim and/or arbitrary action of Magnolia. Under Article 4 of the respective contracts there was no exculpation of Magnolia for failure to furnish pipe as needed except for failure of pipe supplier to deliver pipe to Company according to the present schedule of delivery or if Company was unable to furnish the materials as needed for any other reason beyond its control.

Nothing in these contracts or specifications provided that Magnolia should not be held liable in damages to the contractor if Magnolia diverted forty miles of the pipe to another pipeline company instead of furnishing the same to the contractors as needed; nothing in these contracts provided that Magnolia should not be liable in damages, if it furnished such quantities of pipe to two contractors, that could not use the same for months to come, while other contractors for other segments of the pipeline then needed pipe in order to continue construction operations; nothing in these contracts provided that Magnolia should not be liable in damages if for purposes of its own, particularly for the great material gain of its stockholders, Magnolia elected to complete one segment of the line to Conway and, in effect, held in reserve sufficient pipe for use months later in completing the line when other contractors, as Oklahoma, were badly in need of pipe in order to continue their construction operations.

Emphatically, nothing in the contract and specifications absolved Magnolia from damages when it elected to refuse to furnish pipe and other materials to one contractor as it needed the same in order that Magnolia could hold in reserve 100 miles of the pipe for use at some future date and when it further elected to divert 40 additional miles of the pipe to another and distinct pipe line company. On the contrary, such delays in

furnishing the pipe to the contractor needing the same was not due to failure of the pipe supplier to deliver pipe to Magnolia nor was it due to any other reason beyond the control of Magnolia; under Article 4 of the contracts Magnolia is liable in damages for such delays.

Under the contrary construction of these contracts by the Court of Appeals, pipe line contractors, with their millions of dollars invested in equipment, could not undertake to perform contracts for pipe line companies without adding literally millions of dollars to their contract prices in order to protect themselves against what has happened in his case, thereby increasing the costs to all consumers of products transported by pipe line or of competitive products, including additional costs to the United States in supplying its military and naval forces. Fuel oil and gasoline, for instance, are required in large quantities by our armed forces.

The necessity that the courts enforce the liability of pipe line companies under their contracts is of such public importance that this Court should grant certiorari and review both the judgment of the court below and its order refusing to grant a new trial because of a fraud on the judicial process in the failure of Magnolia to disclose to the trial court and to counsel for Oklahoma that 40 miles of the pipe had been diverted to another pipeline instead of being furnished to Oklahoma to in part meet its needs for pipe for installation purposes.

4. *The concern of the public is very great in the proper regulation and taxation of pipe line companies and is adversely affected by the decisions below.*

Petitioner Oklahoma claims that its losses on this job in excess of one million dollars resulted from the failure of Magnolia to furnish pipe when needed by Oklahoma for installation; from Magnolia's diversion of 40 miles of pipe to the Humble Pipe Line Company; and

from Magnolia's refusal to ratably distribute 100 miles of pipe among the several sections of the Magnolia line as needed by the respective contractors. This excess cost should be paid by Magnolia to Oklahoma and not go into the rate base of Magnolia for rate making purposes; should not be made available to Magnolia to capitalize in its costs for depreciation in its corporate tax returns; and should not be used in order to enable Magnolia to pay increased dividends to its stockholders in 1947 by completing the line to Conway and placing it in use.

There is a very serious question whether the completion of the segment of the line to Conway in the latter part of December 1947, and the running through the segment of a driblet of crude oil to be shipped in tank cars in the closing days of the calendar year 1947 is such good faith compliance with the Consent Decree of 1941 as to authorize the payment of the increased dividends to the stockholders in that tax year.

We appreciate that the Court may not be able in these proceedings to inquire into these matters—but the public importance thereof can not be gainsaid and Petitioner Oklahoma insists that its losses in excess of one million dollars under these contracts with Magnolia and solely due to Magnolia's fault and negligence should be paid by Magnolia and not used for the benefit of Magnolia and its stockholders, irrespective of the possible benefit or detriment to the public.

CONCLUSION

In summation, petitioner claims that under the judgments of the courts below it has been denied its rights under Articles Vth and VIIth of the Bill of Rights; that such courts have ignored and refused to abide by the applicable Rules of Civil Procedure for the District Courts of the United States; that they have grossly misinter-

preted the contracts in suit; that they have ignored the public interests involved of requiring interstate pipe line companies to perform their contracts; that the Circuit Court in denying the motion for rehearing based in part on newly discovered and material evidence has impliedly, at least, condoned and approved what we consider to be fraud on both the trial court and the petitioner; and that both courts are thereby in conflict with decisions of this Court and of other Courts of Appeal.

For any or all of such reasons, this petition for certiorari should be granted.

Respectfully submitted,

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December 5, 1952.